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You Can't Get Here from Here: Toward a More Child-Centered Immigration Law

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INTRODUCTION

Family is a powerful force that shapes many critical life choices. In particular, family plays a central role in decisions about where people live. We routinely anticipate that families will live together and are rarely surprised to see children living with parents and spouses living together. Beyond such traditional nuclear family arrangements are a dizzying array of family configurations and choices about who lives in a household and who is counted as a family member. Just as families often decide to live together, for a host of reasons, many families make difficult choices to live separately, often to advance the best interests of one or all family members. This commonly involves a parent or parents leaving children behind, but this also encompasses children striking out on their own.[1]

In general, these critical decisions about where and with whom to live are left to families. Families themselves determine who is considered family and make decisions about where families and family members will locate. As a baseline, government involvement with such decisions is limited.[2] In fact, although the word "family" is not found in the U.S. Constitution,[3] the Supreme Court has consistently recognized

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[1] *See, e.g.,* Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. Chi. L. Sch. Roundtable 269, 272 (2000).

[2] *See* Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) ("[T]he Constitution prevents [the government] from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.").

[3] In contrast, many international human rights instruments acknowledge the centrality of family explicitly. The Universal Declaration of Human Rights declares that the "family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Article 16(3), Dec. 10, 1948. *See also* Organization of American States, American Convention on Human Rights, Nov. 22, 1969, art, 17(1), 1144 U.N.T.S. 123, 1969 ("the family is the natural and fundamental group unit of society and is entitled to protection by society and the state"); Organization of African of Unity: Banjul Charter on Human and Peoples' Rights, June 27, 1981, art. 18(1); 21 I.L.M. 58, ("The

that the protection of private choices about family integrity is a matter of constitutional dimension.[4] Supreme Court "decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[5] Constraints on family decisions about where to live, therefore, are exceptions and not the rule.

Immigration law, by establishing parameters on who is permitted within national borders, is squarely among the exceptions. Through immigration laws, the government directly and inevitably impacts decisions by immigrant families about where and with whom they live, sanctioning some choices and prohibiting others. Family decisions and immigration law are often in tension. The application of immigration law routinely conflicts with private decisions about family composition and integrity, and in turn family decisions regarding where to live routinely result in the circumvention of immigration provisions.

At the same time that immigration law mandates the separation of many families, the reality that families transcend borders is deeply incorporated in immigration law. Family relationships are integral in the immigration law framework that delineates who is allowed to enter and remain in the United States, and a significant portion of legal immigration is attributable, directly or indirectly, to family

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family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4, 1950, art. 8, 213 U.N.T.S. 222 (entered into force 3 Dec. 1953) ("Everyone has the right to respect for his private and family life . . ."); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 23(1), U.N.T.S. No. 14668 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 10(1), ("The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society...").

[4] The Supreme Court has long acknowledged that among the liberties protected by the due process clause of the constitution is the right to "establish a home and bring up children, ... [a right] essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see also* Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. Mich. J.L. Reform 683, 688 (2001) ("[T]he U.S. Constitution provides parameters that limit the states' abilities to define and regulate family rights and obligations.").

[5] Moore, 431 U.S. at 503-04.

relationships.[6] Simply put, much of legal immigration is traceable to a close family relationship.

This does not mean, however, that the converse is true. In other words, while many immigrants may attribute their legal status to a family connection, the existence of even close family relationships with persons permitted to live in the United States does not inevitably or even usually provide feasible avenues for legal immigration. This is occasionally a surprising revelation. The notion that family ties do not provide a certain route to legal immigration status runs counter to popular conceptions and representations of immigration law, and an understanding of this aspect of immigration law is noticeably absent in the rhetoric that attends the public debate regarding immigration reform.[7] Family plays a central role not only in the growth of the authorized immigrant population, but also in the growth of the unauthorized immigrant population as well.

The misperception that legal immigration opportunities are readily available to immigrants with close family members in the United States is widespread. Yet millions of people with close relatives living in the United States lack viable options to regularize their immigration status. Basic characteristics in immigration law's framework preclude many families with close and lasting ties to this country from successfully navigating the maze of immigration law. In particular, immigrant families that are physically present in this country consistently face dead ends as they seek to obtain legal status for all family members. They can't get here from here.

This reality has profound impacts on the daily lives of immigrant families in general, and on children in immigrant families in particular. A better understanding of the role of family in immigration has important and lasting implications for the nation and immediate application in the ever ongoing discussion of immigration reform.

Part I of this article examines the extensive integration of immigrants into the broader population of families in the United States. Immigrant families are not an isolated and obscure population and the

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[6] *See* discussion, *infra* at notes 9-11 and accompanying text.

[7] *See, e.g.,* President Bush, Address to the Nation on Immigration Reform, (May 15, 2006) http://www/whitehouse.gov/news/releases/2006/05/print/20060515-8.html (focusing on perceived tension between border security and worker visas).

extent of integration is remarkable. The proliferation of mixed status families, in which all family members do not share a common immigration or citizenship status, makes it virtually impossible to conceive of policies that will affect immigrants without also intimately affecting a much broader cross section of the national population, including millions of U.S. citizen children.

Part II of this article explores several characteristics of the legal framework of immigration that create significant barriers to legal immigration for immigrant families living in the United States. In particular, this analysis reveals immigration law's systemic devaluation of children and the diminishment of their interests, giving rise to a narrow, parent-centered conception of family. This section also explores how the excruciating complexity of immigration law can mask the ways in which seemingly innocuous immigration provisions work together to severely curtail immigration options for families in the United States.

Part III of this article examines the serious social consequences that result when families are unable to regularize the immigration status of all family members. Not only are immigrants and immigrant families marginalized, but citizen children in mixed status families are denied the full social benefits of citizenship as a variety of formal and informal barriers assimilate them to the status of noncitizen.

Finally, Part IV of this article discusses motivations for the current boundaries of family immigration systems and envisions a more child-centered approach.

I. IMMIGRANT FAMILIES AND CHILDREN IN THE UNITED STATES

While much attention is paid to the size of the immigrant population, an exploration of the extent of integration of immigrants and immigrant families into the overall population of the United States may provide better insights into this population and its phenomenal growth. Immigrants do not form an isolated population, separate and distinct from the broader population. Millions of immigrants, including those without legal status, are profoundly woven into the national fabric through close family ties with citizens and legal permanent residents.

The classic image of whole families leaning over a ship railing to catch a glimpse of the Statue of Liberty before processing at Ellis Island did happen, and its modern equivalent occurs today. But it has always

been the case that many immigrant families arrive in the United States piecemeal.[8] It is common that immigrant families do not arrive together, as one or more family members travel ahead and others follow. Other immigrants start or increase families after arrival. As a result, there is no one model of an "immigrant family" and constantly shifting immigration laws affect families in quite diverse ways based, in part, on how and when individual family members arrived. One consequence of this is that families in the United States frequently contain a wide mix of immigration statuses, from undocumented to legal immigrant to citizen.

Many families benefit from legal provisions that permit certain forms of immigration related to family. In fact, the legal framework that determines who may immigrate to the United States legally is dominated by considerations of family. First, direct family sponsorship is the most common route of legal immigration.[9] Under family sponsored immigration provisions, U.S. citizens and legal permanent residents may petition for the immigration of certain family members who fall into particular categories.[10] Second, spouses and children may qualify as "derivatives" to immigrants who are principal beneficiaries of other immigration provisions, including employment-based immigration and the diversity visa lottery.[11] All told, approximately 80% of legal

[8] Included in one of the first federal statutes placing any restrictions on immigration was the proviso that "this section shall not be held to exclude persons living in the United States from sending for a relative or friend who is not of the excluded classes under such regulations as the Secretary of Treasury may prescribe." Act of Mar. 3, 1891, ch. 551.

[9] The Bureau of Citizenship and Immigration Services reports that in 2004, 65.6 percent of legal permanent immigration to the United States was accomplished through family-sponsored immigration. Department of Homeland Security, Office of Immigration Statistics, U.S. Legal Permanent Residents: 2004 at 3 (2005).

[10] *See* 8 U.S.C.A. § 1151(b)(2)(A)(i) (2006), 8 U.S.C.A. § 1153(a) (2006). The priority given the petition differs based on the immigration and citizenship status of the sponsoring petitioner and the relationship between the petitioner and the beneficiary. Most petitions face backlogs of many years. *See* discussion *infra* at notes 53-61 and accompanying text. Perhaps unsurprisingly, traditional nuclear families fare best under the statutory scheme. *See* Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 Hofstra L. Rev. 273, 276 (2003) (detailing how immigration law continues its reliance on assumptions based on traditional, nuclear families despite the declining prevalence of this model); Linda Kelly, *Family Planning, American Style*, 52 Ala. L. Rev. 943, 955-60 (2001); Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 Am. J. Comp. L. 511, 528 (1995).

[11] 8 U.S.C.A. § 1153(d) (2006). For example, the spouse and minor children of the recipient of an employment-based immigrant visa may qualify to accompany the principal immigrant.

immigration is attributable to a family relationship.[12] Considerations of family, therefore, dominate the statutory framework of legal immigration.

This is not at all to say that family is unimportant to those arriving in the United States outside the framework of legal immigration.[13] Between four and five million families living in the United States are composed entirely of persons without authorized immigration status.[14] The majority of these "unauthorized families" have no children, though there are approximately 725,000 families with children in the United States in which no member, neither children nor parents, holds legal immigration status.[15]

This highlights the obvious point that while most undocumented immigrants in the United States are adults, a significant number are not. Approximately 1.8 million children, some in families and some unaccompanied, live in the United States without legal immigration authorization.[16] Children thus represent 16% of the entire unauthorized population in the United States.[17]

Still, families in which all members have legal immigration status and those in which none have legal status are only a small part of the picture:

> The casual observer – and policymaker – might readily believe that the country is neatly divided into two kinds of families: those composed of citizens who have strong claims to legal rights and social benefits, and those composed of noncitizens, whose claims to both are more contingent. American families, however, are far more

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[12] Michael Fix, et al., The Urban Inst., The Integration of Immigrant Families in the United States 7-8 (2001), http://www.urban.org/UploadedPDF/immig_integration.pdf (last visited June 1, 2005).

[13] In recognition of the unauthorized migration of families, enforcement efforts targeted at families traveling together have increased. *See Chertoff Says Families Crossing Borders Illegally to Be Detained*, CAJE Project, *available a http://cajeproject.org/blog/?p=5* , (March 21, 2006).

[14] Jeffrey S. Passel, The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey, at 8 (Pew Hispanic Center, March 7, 2006).

[15] *Id.*

[16] *Id.*

[17] *Id.*

> complex: the number of families that contain a mix of both citizens and noncitizens is surprisingly large.[18]

Patterns of immigration and patterns of family formation are independently diverse and in combination they frequently result in the creation of "mixed status" families, that is families in which all family members do not share the same immigration status or citizenship. Such families are remarkably widespread – of the entire population of the United States, one of every ten children now lives in a mixed status family.[19] Further, of families with children and headed by a noncitizen, eighty-five percent are mixed-status families.[20] Fifteen percent of poor children live in mixed-status families.[21]

The permutations of immigration status in mixed status families are myriad. Mixed status families are composed of "any combination of legal immigrants, undocumented immigrants, and naturalized citizens."[22] Moreover, the composition of mixed status families "changes frequently, as undocumented family members legalize their status and legal immigrants naturalize."[23] Further confusing the situation is the fact that the "proliferation of permanent and temporary immigration statuses ... creates new and more complicated types of mixed-status families."[24] While some permutations are rare, others encompass millions of families and children.

For example one in five children in the United States lives in an immigrant family, defined as a family in which one or more parent is an immigrant.[25] Most of these, or "15 percent of all children in the [United States,] were native born children with immigrant parent(s)."[26] This means that the vast "majority of children in what social scientists refer to as 'immigrant families' are actually in mixed status families."[27] This segment of the U.S. child population is growing faster than any other.[28]

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[18] Michael E.. Fix & Wendy Zimmerman, Urban Inst., *All Under One Roof: Mixed-Status Families in an Era of Reform*, 1 (1999).
[19] Fix et al., *supra* note 12 at 15.
[20] *Id.*
[21] *Id.* at 16.
[22] Fix & Zimmerman, *supra* note 18 at 1.
[23] *Id.*
[24] *Id.* at 2.
[25] Federal Interagency Forum on Child and Family Statistics, 2002.
[26] Valerie Leiter, Jennifer Lutzy McDonald & Heather T. Jacobson, *Challenges to Children's Independent Citizenship: Immigration, Family and the State*, 13 Childhood 11, 16 (2006) ("[Four] percent of children were foreign-born with at least one immigrant parent."). *Id.*
[27] *Id.*
[28] *Id* .at 11.

Of the 6.6 million families in the United States with a head of the family or a spouse who is unauthorized, about one-third have U.S. citizen children.[29] From a different angle, over three million U.S. citizen children in the United States live in approximately two million families where at least one parent is not authorized to remain in the country.[30] In some such families, all the children are U.S. citizens, while in other families, siblings do not share a common immigration or citizenship status.[31] In families where a parent is not authorized to remain in the United States, almost two-thirds of all children are U.S. citizens, meaning that the remaining one third of children in such families hold no legal immigration status or a status short of citizenship.[32] While less common, there are some families in the United States in which parents have legal immigration status yet their children do not.[33] Parents within mixed status families also frequently do not share the same immigration status. In fact, in 41% of mixed status families, parents have different citizenship statuses.[34]

In sum, differences in family size and composition, together with the permutations of undocumented status and a multiplicity of legal immigration and citizenship statuses, create confounding variations on the theme of "mixed-status" families. This mix creates confusion in sorting out societal obligations and treatment of immigrant families, as immigrants in the United States are not an isolated and discrete population that can be easily culled from the general population. Through family, immigrants are thoroughly integrated into the national fabric. It is simply not possible to take any action that will affect immigrants without also intimately affecting a much broader swathe of U.S. society, including many U.S. citizens and certainly including many

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[29] Passel, *supra* note 14. More broadly, one in five children in the United States and one in four of low income children in the United States is the child of an immigrant. *See* Michael E. Fix & Jeffrey S. Passel, Urban Inst., Lesson of Welfare Reform for Immigrant Integration 1 (2002).

[30] Jeffrey S. Passel, The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey, at 8 (Pew Hispanic Center, March 7, 2006).

[31] In 1.5 million families in which the head of the family or a spouse is unauthorized, all the children were born in the United States. *Id.* Nearly half a million families in which the head of the family or a spouse is unauthorized have both U.S. citizen children and children without authorized immigration status. *Id.*

[32] *Id.*

[33] Such situations often involve parents who fail, willfully or unwittingly, to take appropriate actions to regularize their children's status. As discussed more fully below, immigration law is framed with an eye to providing parents holding legal immigration status with options to avoid this situation.

[34] Leiter et al., *supra* note 28 at 17.

children. Removing an undocumented immigrant worker from the country has impact that will be felt at home, not just in the workplace. Workers occasionally may be fungible, but family members are not.

As discussed more fully below, the prevalence of a close family member with legal immigration or citizenship status does not a guarantee that immigrants in mixed status families will achieve legal immigration status themselves. Anytime family members do not share the same immigration or citizenship status, there is a possibility that immigration law will reach disparate conclusions about their right to enter or remain in the United States. This means that while some families ultimately will converge on a single immigration status or citizenship, others will permanently stay in a mixed status, facing a perpetual threat to family unity and a variety of everyday challenges.

II. THE MYTH OF THE LINE

In contrast to "past generations in which many undocumented immigrants gradually moved into legal immigration status or maintained a less permanent presence in the United States, today's undocumented population is notable for both its lack of prospects for legalization under current law and its relative stability."[35] For most of this country's history, immigration laws and policies permitted relatively easy access to lawful immigration status.[36] While the share of the U.S. population that is foreign-born is much lower today than it was in the early 1900s,[37] most foreign-born U.S. residents in those earlier times either were admitted to legal immigration status or at least had prospects of attaining it.[38] The specter of illegality did not haunt these earlier generations.

The importance that is now attached to the "illegality" of a person's immigration status is a relatively new phenomenon.[39] Current

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[35] David B. Thronson, Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts, 11 Tex. Hisp. J.L. & Pol'y 45, 52 (2005).

[36] "The government excluded a mere 1% of the 25 million immigrants who landed at Ellis Island before World War I, mostly for health reasons." Mae M. Ngai, *How Grandma Got Legal*, L.A. Times, May 16, 2006 (noting that the "Chinese were the exception, excluded on grounds of 'racial unassimilability'").

[37] Fix, et al. *supra* note 12 at 9.

[38] Mae M. Ngai, *How Grandma Got Legal*, L.A. Times, May 16, 2006, at B13 ("[C]omparisons between past and present miss a crucial point. There were so few restrictions on immigration in the 19th and early 20th centuries that there was no such thing as 'illegal immigration.'").

[39] *See generally*, Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America (2004).

immigration law not only labels many more immigrants "illegal" than in the past, but it also imposes numerous barriers that prevent undocumented immigrants from achieving legal immigration status despite otherwise having eligibility for immigrant visas.

The nation's history of virtually unfettered immigration undoubtedly colors the popular perception that legal immigration status is generally available to those who seek it. For example, in popular and political treatment of the issue of immigration, it is common to hear variations on the notion that any immigration reform should not reward those unlawfully present in the United States by permitting them to "cut in line."[40] The clear implication is that a line exists and, while it might take longer than in the past, patient prospective immigrants eventually will be able to enter the United States legally. Yet the volume of mixed status families in the United States alone indicates that there is more at work than long lines and impatience. The persistence and growth of the undocumented population in mixed status families, undocumented despite close family relationships with persons legally in the United States, call into question the idea that families are readily able to move through the immigration system and obtain legal immigration status for all family members.

Upon closer inspection of the provisions of immigration law, the myth of "the line" is dispelled. Under modern immigration law significant barriers stand in the way of families which make it difficult or even impossible to get here (legally), especially when the family already is here (physically). Some of the barriers are fundamental to the structure of immigration law. In fact, they are so engrained that they often are taken for granted, or viewed as merely a natural state of affairs. Other barriers arise in the technical interplay of complex immigration statutes. A common aspect, however, is the systemic devaluation of children and the diminishment of their interests.

A. ASYMMETRIC AGENCY AND THE DEVALUATION OF CHILDREN'S INTERESTS

Immigration law devalues children most fundamentally by denying children agency throughout the principle frameworks of immigration law. Certainly, the ubiquitous "best interests of the child" standard that governs or influences many decisions affecting children in other arenas

[40] *See, e.g.*, President Bush *supra* at note 7 (stating that potential beneficiaries of immigration reform "will have to wait in line behind those who have played by the rules and followed the law").

does not drive immigration law.[41] But immigration law goes beyond merely ignoring the interests of children. Immigration law is systemically and specifically designed to limit the role of children and the value placed on their interests.

1. Definition, Dependency and Devaluation

By definition in immigration and nationality law, no "child" exists except in relation to a parent.[42] The statutory definitions of "child" require the satisfaction of qualifying conditions, generally the demonstration of a particular relationship between a child and a parent, such as birth in wedlock, creation of a stepchild relationship, "legitimation," or adoption. In discrete ways, the establishment of each of the qualifying relationships requires a demonstration of the dependency of the child on the parent.[43] In contrast, in limited instances when immigration law is forced to contemplate children independently of parents, it treats them not as "children" but rather haphazardly as "juveniles" or "minors."[44]

Moreover, immigration law reserves to the parent the power to recognize and establish a parent-child relationship for immigration purposes.[45] For example, in the absence of parental action to "legitimate" or establish a bona fide relationship with a child, proof of or even admission of parentage is insufficient to establish a parent-child relationship for immigration purposes.[46] Therefore, any immigration

[41] In fact, the notion of the best interests of the child appears in immigration law only with respect to special immigrant juveniles, children dependent upon a juvenile court for whom family reunification is not a viable option. 8 U.S.C.A. § 1101(a)(27)(J) (2006). So foreign to immigration law is the concept of "best interests of the child" that in these cases special factual findings with regard to the child's interest are made not in immigration proceedings but in a state juvenile court. *Id.*

[42] The Immigration and Nationality Act provides distinct definitions of child for statutory provisions relating to immigration and provisions relating to nationality. *See* 8 U.S.C.A. § 1101(b)(1)(B) (2006) (defining "child" for purposes of immigration provisions) and 8 U.S.C.A. § 1101(c)(1) (2006) (defining "child" for purposes of nationality provisions). The differences, though significant in particular cases, are not relevant to this analysis.

[43] For a fuller discussion of how notions of dependency are embedded in the immigration law definition of child, see David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 Ohio St. L.J. 979, 991-92 (2002).

[44] Flores-Chavez v. Ashcroft, 362 F.3d 1150, 1159 (9th Cir. 2004).

[45] Thronson, *supra* note 43 at 991-92 (describing how immigration law "recognizes a 'child' only through parental action").

[46] In a few instances, state action may establish the prerequisite dependency. *See, e.g.*, Matter of Goorahoo, 20 I. & N. Dec. 782, 785 (BIA 1994) (noting that

benefit that immigration law makes available on the basis of being a "child" necessarily requires parental action. In sum, "[p]arental possession and control are the hallmarks of a parent-child relationship in immigration law."[47]

Through this narrow definition of children, immigration law establishes children as passive objects and not actors in the immigration system.[48] This conception of children sets the stage for further devaluation of the interests of children. If children are viewed as passive, it seems only natural to deny agency to children in immigration law and, more broadly, to limit the use of children and their interests as organizing forces in family immigration.

2. Family Immigration and the Parent-Centered Family

In immigration law, families are conceived around parents, not around children. This starts with the parent-controlled definition of "child" and continues with the overall framework of family sponsored immigration. Parents are the critical players in this framework, and children and their interests in family integrity are ignored or relegated to the background. This happens because the statutory scheme of immigration law, to the extent that it advances family integrity, does so only in the narrow sense of creating opportunities for parents to align their children's status with their own. Children, on the other hand, are denied any agency and opportunity to extend immigration status to their parents. A fuller understanding of this requires a brief review of the

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"when the country where a child was born eliminates all legal distinctions between legitimate and illegitimate children, all children are deemed to be the legitimate offspring of their natural parents from the time that country's laws are changed"). In such cases, "state action shifts power away from parents, but not toward children." David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 Ohio St. L.J. 979, 992 n.84 (2002).

[47] Thronson, *supra* note 43 at 992.

[48] Immigration law thus adopts an antiquated property-based view of children, a conception in children are regarded as "being naturally dependent, belong[ing] to the individuals who create them until majority, when they acquire the status of independent individuals." Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L. Rev. 1747, 1811 (1993). A modern model of children as property "asserts not that children *are* property but that our culture makes assumptions about children deeply analogous to those it adopts in thinking about property." Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 Wm. & Mary L. Rev. 995, 1042 (1992) (emphasis added).

workings of family-sponsored immigration, the source of most legal immigration.

Generally, the statutory framework of immigration law permits citizens and legal permanent residents to petition for family members who fall within certain limited categories to be admitted to the United States as legal permanent residents.[49] In this scheme, the person having legal immigration status is the "petitioner," and the person petitioned for is the principal "beneficiary." If this principal beneficiary has a spouse or children, the spouse or children may in some instances acquire immigration status as "derivatives" of the principal beneficiary.[50]

The priority given to the petition depends upon both the immigration status of the sponsoring petitioner, as either citizen or legal permanent resident, and the relationship between the petitioner and the beneficiary.[51] The law prioritizes petitions of citizens over those of legal permanent residents, and favors the parent-child relationship of traditional nuclear families over other family relationships.[52] Certain relationships, for instance the relationship between a citizen parent and a child, are not subject to numerical limitation and provide for the immediate availability of an immigrant visa.[53] On the other hand, relationships such as that between a legal permanent resident parent and a child are subject to annual numerical limitations and resulting backlogs that now extend many years.[54] Not all family relationships are recognized, and the recognized relationship given lowest priority by immigration law, the relationship between adult citizens and their siblings, includes backlogs that currently extend to more than twenty years.[55]

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[49] *See* 8 U.S.C.A. § 1151(b)(2)(A)(i) (2006), 8 U.S.C.A. § 1153(a) (2006).
[50] *See* 8 U.S.C.A. § 1153(d) (2006).
[51] *See id.*
[52] *See generally* Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage? Immigration Law's Conflicted Answer*, 32 Hofstra L. Rev. 273 (2003); Linda Kelly, *Family Planning, American Style*, 52 Ala. L. Rev. 943, 955–60 (2001); Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 Am. J. Comp. L. 511, 528 (1995); Victor C. Romero, *Asians, Gay Marriage and Immigration: Family Unification at a Crossroads*, 15 Ind. Int'l & Comp. L. Rev. 337 (2005).
[53] *See* Immigration and Nationality Act, 8 U.S.C.A. § 1151(b) (2006). Processing times and bureaucratic delays can be extensive – the immediate availability of an immigration visa should not be confused with the ability to immigrate immediately.
[54] For example, the August 2006 Visa Bulletin issued by the Department of State shows that the government is now processing visas for the spouses and minor children of legal permanent residents who applied in September 1999, nearly seven years ago. Dep't St. Visa Bull., August, 2006.
[55] *See id.*

In this statutory scheme, the parent-child relationship is favored, but only when the parent holds legal immigration status. Both citizen and legal permanent resident parents can petition for children. Children, on the other hand, may never petition for their parents – citizens ultimately may petition for their parents, but only when they reach age 21 and cease to be "children" under immigration law.[56]

The pattern of preventing immigration status to flow from a child to other family members is ubiquitous in immigration law. For example, a child cannot include a parent as a derivative if the child obtains legal immigration status.[57] Further, derivative status extends only one generation, so that young parents who otherwise would qualify as derivatives cannot even extend immigration status to their own children.[58] Even more, while adult asylees and refugees can obtain derivative status for their spouses and children, child asylees and refugees cannot obtain such status for their parents.[59]

The framework for family-sponsored and derivative immigration thus subordinates children's status to that of their parents. When parents are successful in navigating the immigration system, their children may benefit. Yet children with legal immigration status cannot reciprocate and extend such family based immigration benefits to a parent or other family members. The system is geared to assimilate children's status to that of their parents, not the other way around.[60] This asymmetry is not a reflection of the relationship involved – in all of these instances the same family relationship may allow an extension of immigration status if the legal status holder is the parent, not the child.[61] Yet unlike similarly

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[56] 8 U.S.C.A. § 1151(b)(2)(A)(i) (2006).

[57] 8 U.S.C.A. § 1153(d). If, for example, a child immigrates on the basis of a parent-child relationship with one parent, immigration law does not then permit derivative status to extend to this child's other parent or siblings.

[58] 8 U.S.C.A. § 1153(d).

[59] *See* Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(3), 1157(c)(2) (2000). Similarly, there is no statutory provision for reunification with parents for a child granted protection from removal pursuant to the Convention Against Torture. *See generally* Lori A. Nessel, *Forced to Choose: Torture, Family Reunification and United States Immigration Policy*, 78 Temp. L. Rev. 897 (2005).

[60] *See* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 Nev. L.J. 1165 (2006).

[61] *See* Jacqueline Bhabha, *The "Mere Fortuity" of Birth? Are Children Citizens*, 15(2) Differences 91, 95 J. Feminist Cultural Stud..(discussing the "striking asymmetry in the family reunification rights of similarly placed adults and minor children"). Children also face barriers in other major immigration law programs not directly related to family. Children generally cannot apply

situated adults, children who hold legal immigration or citizenship status simply are not permitted to extend that status to other family members.

For purposes of immigration law, therefore, families centered on parents with status are recognized and valued. The immigration scheme values the parents' interests in family integrity and provides for the possibility that such parents will choose to attempt to extend legal status to their children. But the family immigration provisions of immigration law turn a blind eye to families in which only children hold legal immigration status. Children's interests in family integrity do not serve as a basis for possible extension of immigration status.

B. THE DEVIL IN THE DETAILS – BARRIERS TO LEGAL IMMIGRATION STATUS FOR FAMILIES LIVING IN THE UNITED STATES

As the broad sweep of family immigration devalues children and their role in families, the details of immigration law follow suit. Immigration law creates barriers to regularizing status in the interplay of complex immigration statutes, in ways that often elude meaningful public debate because of their technical complexity. Further, as the constant evolution of immigration statutes has proceeded, the complexity of statutory provisions has only escalated. This pattern of development in immigration law masks the real impact of many seemingly innocuous statutory provisions and obscures from debate the actual policies that are advanced. A prime example of this is found in the limitations placed on the availability of "adjustment of status."

Some immigrants who are present in the United States and otherwise meet all substantive qualifications for an immigrant visa are permitted to "adjust status" to legal permanent resident.[62] This simply means that if they otherwise qualify to immigrate legally to the United States, they may process their applications for admission as legal permanent residents while remaining in the United States rather than traveling to the

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under the diversity visa lottery because applicants must be high school graduates or have equivalent education or work experience. 8 U.S.C.A. § 1153(c)(2) (2006). While children are not directly prohibited from applying for employment-based immigrant visas, it is highly unlikely that they would have the requisite education or job experience to qualify. *See* 8 U.S.C.A. § 1153(b) (2006).

[62] To qualify for adjustment, a person must be "eligible to receive an immigrant visa" and "admissible to the United States for permanent residence. 8 U.S.C.A. § 1255(a) (2006). Further, an applicant must show that "an immigrant visa is immediately available to him at the time his application is filed." *Id.*

United States embassy in their home country.[63] While it may seem illogical that a person in the United States who is eligible for an immigrant visa must leave the country in order to reenter with that status, this is precisely what immigration law required in all instances until 1952 when adjustment of status provisions were first enacted.[64]

The option to adjust status has never been available to all who would like to take advantage of it. It is prohibited for persons with certain present or past violations of immigration law such as unlawful presence, illegal entry, and unauthorized work.[65] People who were barred from adjusting status faced the inconvenience of consular processing at an embassy abroad, but until 1996 this was largely a matter of convenience. Keep in mind that permitting adjustment of status simply changes where processing is accomplished, but "in no way relaxes the substantive criteria for [legal permanent resident] status."[66]

In 1994, Congress for the first time permitted some persons barred from adjustment to overcome some disqualifying violations through payment of a fine.[67] The statutory provision which accomplished this, commonly referred to by its citation in the Immigration and Nationality Act, § 245(i), permitted the adjustment of status of persons who, among other things, entered the country without inspection, worked without authorization or were unlawfully present in the United States. For example, pursuant to § 245(i) a person who crossed the border without inspection and later married a U.S. citizen could still adjust status upon approval of a family petition establishing the bona fides of the marriage, despite having entered without inspection. Section 245(i) was enacted with a sunset provision and was permitted to expire in 2001. It today remains relevant to some who benefit from grandfathering based on petitions filed prior to its expiration, but is not available for those who rely only on petitions filed after its expiration.[68]

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[63] 8 U.S.C.A, § 1255(a) (2006).
[64] Stephen H. Legomsky, Immigration and Refugee Policy, 491 (Foundation Press, 4th ed. 2005). The absence of adjustment of status was the result, in large part, of Congress' decision until this time to vest power to issue visas exclusively with the Department of State, which fulfilled this function through consular officers posted abroad.
[65] 8 U.S.C.A. § 1255(c).(20006).
[66] Legomsky *supra* note 64, at 491.
[67] 8 U.S.C.A. § 1255(i) (2006).
[68] In some instances, the filing of a petition that was approvable when filed prior to expiration may provide continuing availability of § 245(i) for subsequently filed petitions. 8 U.S.C.A. § 1255(i) (2006); William R. Yates, U.S. Citizenship

In 1996, the ability to adjust status took on new importance with the addition of immigration law provisions barring for three years the reentry of people who leave the United States after remaining here unlawfully for more than 180 days.[69] A person who remains in the United States unlawfully for a year or more, then leaves, is barred from reentry for ten years.[70] These bars to reentry take effect only when a person departs the country, so they will not affect a person who is able to adjust status without leaving the country. As a result, a person who has been in the country unlawfully for more than a year and is married to a U.S. citizen cannot consular process without facing a ten year wait because consular processing would involve departing the United States. However, if persons in such situations are able to pay a fine under § 245(i) and adjust status while in the United States, they will be able to obtain legal permanent residence on the basis of the marriage.

In the absence of § 245(i) or a similar provision, the unlawful presence bars mean that many families that otherwise would be able to regularize the status of family members cannot do so without facing a ten year exile. Consider the common mixed status family consisting of an undocumented immigrant with a U.S. citizen spouse and children. The unavailability of adjustment of status means that achieving legal immigration status for the undocumented spouse would involve that person living outside the country for ten years. For many families, especially those with young children, this option is unthinkable, especially if the undocumented parent's income is essential to support the family.

As a result, "the statutory provision meant to encourage compliance with the law may have encouraged the opposite: People wait in the United States hoping for a method of legalizing or adjusting status rather than leaving the United States and triggering the bar."[71] When the prospect of years of family separation is balanced against continued unlawful presence in the United States, many families choose the latter.

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and Immigration Services, Interoffice Memorandum, Clarification of Certain Eligibility Requirements Pertaining to an Application to Adjust Status under Section 245(i) of the Immigration and Nationality Act, March 9, 2005.

[69] 8 U.S.C.A. § 1182(a)(9)(B)(i)(I) (2006).

[70] 8 U.S.C.A. § 1182(a)(9)(B)(i)(II) (2006).

[71] Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. Int'l L. & Com. Reg. 483, 488 (2002).

Further, increased attention to national security means that U.S. border crossings have become more dangerous.[72] Interior enforcement of immigration laws has been given a lower priority than border security, and the risks of being caught crossing a border exceed those of being removed after arrival.[73] This enforcement concentration on the border discourages older patterns of seasonal migration and encourages a relatively permanent settlement pattern for undocumented immigrants.[74]

The resulting situation has particular impact on families with members from Mexico and Central America, as persons from these regions are overly represented among those who entered without inspection.[75] As such, the facially neutral provision barring adjustment has a focused impact on a particular regional group.[76] This, in turn,

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[72] *See* Press Release, Department of Homeland Security, DHS Announces Expanded Border Control Plans (Aug. 10, 2004), *available at* http://www.dhs.gov/dhspublic/display?content=3930 (last visited June 1, 2005).

[73] H. G. Reza, *Border Patrol Faces New Limits in Inland Empire*, L.A. Times, Aug. 4, 2004, at B1 (reporting that "[d]ocuments and interviews show that Department of Homeland Security officials want to concentrate Border Patrol agents at the borders and limit their inland activity to arresting illegal immigrants while they are traveling from the border and at transportation centers such as Los Angeles International Airport and highway checkpoints such as those at Temecula and San Clemente.").

[74] Although "as much as 45% of the total unauthorized migrant population entered the country with visas," Pew Hispanic Center, Modes of Entry for the Unauthorized Migrant Population at 1 (May 22, 2006), http://pewhispanic.org/files/factsheets/19.pdf. , in recent years, "on average 97% of the overall apprehensions made by the [U.S. Border Patrol] occur along the U.S. border with Mexico." Congressional Research Service, Border Security: Apprehensions of "Other Than Mexican" Aliens, at 12, www.ilw.com/immigdaily/news/2005,0929-CRS.pdf (Sept. 22, 2005). In Fiscal Year 2004, 93% of persons apprehended were Mexican nationals. *Id.* at 1. The top five nationalities of "other than Mexican" persons apprehended include four from Central American: Honduras, El Salvador, Guatemala and Nicaragua. *Id.* at 17

[75] Only 16% of unauthorized migrants from Mexico and 27% of unauthorized migrants from Central American are visa overstays. Pew Hispanic Center, Modes of Entry for the Unauthorized Migrant Population at 4 (May 22, 2006), http://pewhispanic.org/files/factsheets/19.pdf. In contrast, 91% of all other unauthorized migrants are visa overstays. *Id.*

[76] Such a result is not uncommon in the history of immigration law. The long lasting and targeted exclusion of Chinese from the United States was achieved, in part, through neutrally worded provisions such as that excluding persons who were "ineligible for citizenship." *See* Mae M. Ngai, Impossible Subjects (Princeton University Press 2004). For another example, Kerry Abrams persuasively establishes that "the Page Law [of 1875] was not a minor statute targeting a narrow class of criminals, but rather an attempt to prevent Chinese women in general from immigrating to the United States." Kerry Abrams,

contributes to the fact that Mexicans constitute the largest national group among the undocumented population in the United States.[77]

Moreover, the technicalities of these statutes echo the broader theme of immigration law by devaluing the interests of children. A narrow waiver of the three- and ten-year bars is available to those who can prove that "refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien."[78] In other words, the ten-year barrier to entry may be overcome by showing hardship to adult family members, but hardship to children is irrelevant. The immigration scheme here again insures that children's interests are not given weight and do not result in immigration status being extended to a family member.

From the basic structure of family immigration to the minute details of procedural statutes, immigration law devalues the interests of children. As a result, many immigrant families find themselves precluded from avenues to achieve legal immigration status despite the citizenship and immigration status of some family members. This also means that many citizen children perpetually remain in mixed status families. As discussed more fully below, this result is intentional. And it is not benign.

III. CONSEQUENCES FOR IMMIGRANT FAMILIES

Immigrant families face a variety of challenges and consequences not encountered by native households. Immigrant families are marginalized in some ways that exist for all immigrant families and in others that are reserved for families with members lacking legal immigration status. For many mixed status immigrant families, social benefits are outright denied or access to them is limited. Other families face concerns for family integrity which is threatened directly through the inability of family members to come to the United States or the removal of family members pursuant to immigration laws. And in everyday life, mixed status families face a range of challenges as they interact with societal institutions unsure of the implications associated with the array of statuses held by family members.

Polygamy, Prostitution, and the Federalization of Immigration Law, 105 Colum. L. Rev. 641, 641 (2005).

[77] Passel, *supra* note 14 at 4 (noting 56% of unauthorized migrants are from Mexico).

[78] 8 U.S.C.A. § 1182(a)(9)(B)(v) (2006).

A. FORMAL AND INFORMAL BARRIERS TO SOCIAL BENEFITS

Decades ago in *Plyler v. Doe*, the U.S. Supreme Court acknowledged "the creation of a substantial 'shadow population' of illegal migrants – numbering in the millions – within our borders" and warned that this "raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents."[79] The undercaste foreseen by the Court certainly exists today in the United States, and its numbers now include lawful residents in addition to undocumented immigrants.

Over the past decade, reforms in social benefits law have introduced significant distinctions in the availability of public benefits between citizens and noncitizens, even noncitizens with legal permanent resident status.[80] As such, the "benefits that our society makes available to citizens and lawful residents" referred to in the *Plyler* decision are now denied to many lawful residents.[81]

Even citizens often are deprived the full social benefits of their citizenship when they live in immigrant households. Indeed, "most policies that advantage or disadvantage noncitizens are likely to have broad spillover effects on the citizen children who live in the great majority of immigrant families."[82] Welfare reform, for example, "created two classes of citizen children. One class lives in households with noncitizens and suffers the disadvantages of losing benefits and the reduced overall household resources that may result; a second class of citizen children lives in households with only citizens and suffers no comparable disadvantage."[83] When benefits to a family are prorated to exclude non-citizens, the whole family suffers, including citizen children.

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[79] Plyler v. Doe, 457 U.S. 202, 218-19 (1982).

[80] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 110 Stat. 2105, 2269 (1996). *See also* Leiter et al., *supra* note 28 at 17(noting that 1996 legal reforms "target social benefits to a more restricted scope of beneficiaries and citizenship status is now one of the screens that is used to determine eligibility").

[81] Plyer, 457 U.S. at 219.

[82] Fix & Zimmerman, *supra* note 18 at 2.

[83] *Id.* "Even if immigrant families did maintain food stamps for their children, the amount of those benefits would be lower, because the number of 'eligible' people in the household is now used to determine the amount of food stamps available." Leiter et al., *supra* note 28 at 20.

Moreover, citizen children in immigrant families may not even receive needed benefits for which they are plainly eligible. Differences in immigration status within families are "problematic for children because 'often it is adults who claim citizenship rights for children and do so on their behalf' and immigrant parents of citizen children may now find themselves in the position of requesting benefits for their children for which they (the parents) are not eligible."[84] In this situation, parents are discouraged from seeking benefits for their children, and "inequalities in access within families have been created informally through the actions of parents and public program staff ... resulting in a hierarchy of citizen children's access to social benefits, which is ordered by their parents citizenship and immigration status."[85] This means that although "citizen children of immigrant parents are formally 'insiders' and therefore are fully eligible for social benefits, their parents' non-citizen, 'outsider' status may eclipse their children's citizenship, resulting in citizen children informally taking on their parent's citizenship status."[86] Citizen children in mixed status families thus are assimilated to the status of undocumented children.

As a result, and contrary to the notion that immigrants come to the United States seeking welfare, citizen children of immigrants access less public benefits than citizen children of citizens.[87] For example, many "mixed-status families have stopped participating in food stamp programs overall, and one study found that use of food stamps by citizen children living in legal immigrant families declined 12 percent more than the use by citizen children living in native-born families between 1996 and 1997."[88]

Unsurprisingly, mixed-status families "are more likely to be poor than other families."[89] For immigrants, inclusion among the poor generally means inclusion among the working poor. Immigrants "are

[84] Leiter et al., *supra* note 28 at 17.
[85] *Id.* "While all citizen children have the same formal rights to social benefits, informally parents and street-level bureaucrats who implement public policy at the ground level may believe that parents' citizenship statuses eclipse children's individual citizenship, and may act on those beliefs." *Id.* at 20.
[86] *Id.* at 17.
[87] Michael E. Fix & Jeffrey S. Passel, Lesson of Welfare Reform for Immigrant Integration, at 3 (Urban Institute March 8, 2002). "Significant declines have also been seen in citizen child applications from mixed-status families." Leiter et al., *supra* note 28 at 20.
[88] Leiter et al., *supra* note 28 at 20. Likewise, "a recent report stated that there was 'widespread perception' among undocumented parents that their citizen children are not eligible for Medicaid. *Id.* at 21.
[89] Michael E. Fix and Wendy Zimmerman, All Under One Roof: Mixed-Status Families in an Era of Reform, at 2 (Urban Institute 1999).

overrepresented among all U.S. workers but they are especially overrepresented among low-paid workers."[90] Still, "[d]espite similar levels of work effort among their parents, children of immigrants are substantially more likely than children with U.S.-born parents to be poor, have food-related problems, live in crowded housing, lack health insurance, and be in fair or poor health."[91] In fact, in the United States "one-quarter of all children living in low-income families had one or more foreign-born parents."[92]

Children in mixed-status families face other sources of insecurity. For example, "21 percent of all uninsured children nationwide and over one-half of California's uninsured children live in mixed status families."[93] Children "in low-income working immigrant families were more than twice as likely as those in comparable native families to lack health insurance coverage in 2002."[94] And children of immigrants are "significantly less likely to be in any regular nonparental child care arrangement."[95]

Through combinations of formal and informal denials of benefits, and in some cases the many challenges to earning income that attend the lack of legal immigration status, compared "with households with native-born householders, immigrant households are more likely to be low-income, live in poverty and be uninsured."[96] These are real consequences linked to the inability of families to move through the immigration and naturalization system, and these outcomes are not fleeting. As the ability of families to regularize the immigration status of all family members is denied or slowed, "citizen children in these mixed families could exhibit less intergenerational mobility than they would have if their parents had been able to legalize."[97]

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[90] Randy Capps, Michael Fix, Everett Henderson, and Jane Reardon-Anderson, A Profile of Low-Income Working Immigrant Families, at 1 (Urban Institute June 2005). Immigrants represented 11% of the overall population, but 14% of workers and 20% of low wage workers in the U.S. economy. *Id.*

[91] *Id.* at 1. "Working immigrant families were about twice as likely as working native families to be either low-income (under 200 percent of FPL) or poor (under 100 percent of FPL). *Id.* at 2.

[92] *Id.* at 1.

[93] *Id.* at 2.

[94] *Id.* at 4. "The share of immigrant adults in low-income working families without health insurance is double the share of uninsured children in these families." *Id.* One study indicated that 56% "of foreign-born adults in low-income working families were uninsured, versus 29% for comparable native-born adults." *Id.*

[95] *Id.* at 5 ("37 percent versus 57 percent for children of natives").

[96] Leiter et al., *supra* note 28 at 12

[97] Fix & Zimmerman, *supra* note 18. at 5.

It certainly should not be at all surprising that citizen children fare worse when their parents are hampered in attaining immigration and citizenship status. In our national legal and social structures, parents are the foremost protectors of children and their interests.[98] Marginalizing parents inevitably results in marginalizing children. By creating a legal immigration framework that stops families from achieving legal immigration status, the interests of children, including citizen children, are compromised in significant and lasting ways.

B. DE FACTO DEPORTATION

For many citizen children, living without the full social benefits of citizenship with an intact mixed status family is preferable to at least some of the alternatives. Parents who are not able to regularize their immigration status are subject to removal from the United States, even when they play a crucial role in the support and nurture of citizen children. When formal removal of parents happens, children either remain in the United States separated from their parents or accompany parents abroad through so-called de facto deportation.[99] One outcome denies citizen children their right to remain in the United States, and the other destroys their right to live in an intact family.

Courts across the country have consistently rejected a possible a third outcome, turning away a variety of constitutional claims that a child's immigration and citizenship rights prohibit the parents' removal.[100] Children's valid immigration status or citizenship status

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[98] Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating that it is "cardinal . . . that the custody, care and nurture of the child resides first in the parents").

[99] The child "as an American citizen, has an uncontested legal right to remain in this country, if the order [to deport parents] is enforced he must either suffer to be separated from his natural parents (an unlikely event in view of his tender years) or leave with them-- in violation, it is contended, of his constitutional rights, privileges and immunities. In practical terms, the impact of the order expends its force as much upon the infant as upon the parents." Application of Amoury, 307 F.Supp. 213, 215 (S.D.N.Y. 1969).

[100] *See* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 Nev. L.J. 1165, 1195 (2006). *See also,* Enciso-Cardozo v. INS, 504 F.2d 1252 (2d Cir. 1974); Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977); Gallanosa v. United States, 785 F.2d 116 (4th Cir. 1986); Gonzalez-Cuevas v. INS, 515 F.2d 1222 (5th Cir. 1975); Newton v. INS, 736 F.2d 336, 343 (6th Cir. 1984); Mendez v. Major, 340 F.2d 128 (8th Cir. 1965), disapproved on other grounds sub nom. Cheng Fan Kwok v. INS, 392 U.S. 206 (1968); Urbano de Malaluan v. INS, 577 F.2d 589 (9th Cir. 1978); de Robles v. INS, 485 F.2d 100 (10th Cir. 1973). The First and District of Columbia Circuits rejected similar claims made by spouses. Silverman v. Rogers, 437 F.2d 102 (1970), *cert. denied*, 402 U.S. 983 (1st Cir. 1971); Swartz v. Rogers, 254 F.2d

alone is not sufficient to overcome the removal of a parent from the United States.[101] In analyzing such claims, courts have relied heavily on the notion that citizen children who leave the country with deported parents have a right to return when they reach adulthood.[102]

Removal from the United States implicates "issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."[103] In some instances, removal "may result in the loss of all that makes life worth living."[104] While not every decision to remove children from the United States will result in hardship, the possibility of deprivation and harm often will be present. Further, despite a right to return, removal of citizen children from the United States is certain to limit their development of important bonds with their country of citizenship. In some instances, even the possibility of removal can have tremendous impact on a family's approach to life in the United States.

C. DAILY CONTRADICTIONS

Undocumented immigrants and mixed status families face a rash of contradictory messages and consequences as they interact with a society that does not legally sanction their presence. Individuals and institutions

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338 (D.C. Cir. 1958). The Seventh Circuit has rejected similar arguments raised in slightly different contexts. *See* Oforji v. Ashcroft, 354 F.3d 609, 617 (7th Cir. 2003) (rejecting argument that would in effect "allow deportable aliens ... to attach derivatively to the right of their citizen children to remain in the United States.").

[101] Thronson, *supra,* note 100, at 1195.

[102] Acosta, 558 F.2d at 1158 (noting that upon reaching adulthood "as an American citizen she may then, if she so chooses, return to the United States to live"). *See also* Newton, 736 F.2d at 343 ("Newton children will remain American citizens who have the right to return to this country at any time of their liking"); Ayala-Flores v. INS, 662 F.2d 444, 446 (6th Cir. 1981) ("[O]nce she reaches the age of discretion, [she] will be able to decide for herself where she will live, and at that time, she will be free to return and make her home in this country.").

[103] Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950). The interest in remaining in the United States is, "without question, a weighty one. She stands to lose the right 'to stay and live and work in this land of freedom.'" Landon v. Plasencia, 459 U.S. 21, 34 (1982) (quoting *Bridges*, 326 U.S. at 154). Removal is "always a harsh measure." Cardoza-Fonseca, 480 U.S. at 449. Indeed, it is "a sanction which in severity surpasses all but the most Draconian criminal penalties." Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977); *see also* United States ex rel. Klonis v. Davis, 13 F.2d 630, 630 (2d Cir. 1926) ("However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples.").

[104] Bridges, at 326 U.S., at 47 (internal quotation marks and citations omitted).

struggle to respond in their interactions with persons who are not authorized to be present, but who have genuine legal and moral claims that in many instances transcend their immigration status. One example of this struggle is found in the nation's family courts.

Unfortunately, as immigrant families become more integrated into life in the United States, they tend to develop an "all-too-American pattern of immigrant family disintegration."[105] When immigrants and mixed status families arrive at family courts, immigration related issues come with them. Given the rise of mixed status families in the United States, it is very common that all the parties in family court proceedings do not share a common citizenship or immigration status. In such instances, parties routinely seek to exploit differences in immigration status, and some family courts readily acquiesce.[106] Even where discriminatory requests are rebuffed, immigration status issues present family courts with puzzling questions as they attempt to distinguish fact from stereotype in understanding the complications of living in the United States without legal immigration status.[107]

By stopping families short of achieving a common immigration or citizenship status, immigration law complicates the daily lives of immigrant families. The everyday implications of having family members without legal immigration status are felt daily in courts, schools, workplaces, departments of motor vehicles, and other societal institutions. This also certainly impacts family dynamics and the lives of children in immigrant families.

IV. VALUING CHILDREN'S INTERESTS IN IMMIGRATION LAW

The asymmetry in the value placed upon the interests of children and those of parents in immigration law is closely linked with concern about creating incentives for undocumented immigrants to have children in the United States. The citizenship concept of *jus soli*, the right of the land, extends U.S. citizenship to children born in the United States.[108] The Fourteenth Amendment states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

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[105] Michael F. Fix, et al. *supra* note 12 at 20.
[106] David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 Tex. Hisp. J.L. & Pol'y. 45, 56-63 (2005).
[107] *Id.* at 72-75.
[108] Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 Am. J. Comp. L. 511, 516 (1995) (noting that the age requirement to sponsor a parent "is attributable to jus soli citizenship law").

the United States and of the State wherein they reside."[109] The Supreme Court has interpreted this to mean that, with a few delineated exceptions, all children born in the United States are U.S. citizens at birth, regardless of the immigration status of their parents.[110]

Proposals for either statutory reform or constitutional amendment to limit the application of the *jus soli* principle in order to restrict the acquisition of citizenship by the children of undocumented immigrants are often advanced, but none have gained sufficient support to have any realistic chance of enactment.[111] Even in the unlikely event that such a proposal were to take effect, it would operate only prospectively for future generations.[112] As a practical matter then, *jus soli* citizenship and mixed status families are with us well into the foreseeable future. The policies that have been adopted in reaction to *jus soli* citizenship, however, warrant immediate review.

The great fear is that "[w]ithout a minimum age [for petitioning], an undocumented alien could cross the border, give birth in the United

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[109] U.S. Const. amend. XIV, § 1. This mandate is incorporated into statute at 8 U.S.C. § 1401.

[110] Elk v. Wilkins, 112 U.S. 94 (1884), held that Native Americans born within the United States but within tribal authority were not "subject to the jurisdiction" of the United States and thus did not acquire U.S. citizenship at birth. Citizenship at birth is now conferred to affected Native Americans by statute. 8 U.S.C. § 1401(b). The Court later clarified that the only other persons falling outside the "subject to the jurisdiction" clause are "children born of enemy aliens in hostile occupation, and children of diplomatic representatives of a foreign state." United States v. Wong Kim Ark, 169 U.S. 649, 682 (1898). For a view questioning whether *jus soli* citizenship is constitutionally mandated, *see* Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003) (Posner, J., concurring).

[111] "Advocates of such a change emphasize the importance of mutual consent--the polity's as well as the alien's--in legitimizing American citizenship. They also point to the irrationality of permitting a Mexican woman with no claims on the United States to be able to confer American citizenship on her new child simply by crossing the border and giving birth, perhaps at public expense, in an American hospital. Defenders of birthright citizenship stress the importance of avoiding the creation and perpetuation of an underclass of long-term residents who do not qualify as citizens, a condition similar to that of many guestworkers and their descendants stranded in countries that reject the jus soli principle." Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 Geo. Immigr. L.J. 1, 20 (1997).

[112] "United States citizenship, once acquired, is virtually impossible to lose without the citizen's express consent. Supreme Court decisions since the 1960s have severely restricted the government's power to denationalize a citizen for reasons of disloyalty, divided allegiance, or otherwise. Today, the government cannot prevail against a birthright or jus sanguinis citizen unless it can prove that the citizen specifically intended to renounce his or her citizenship." *Id.* at 11-12.

States and immediately have the newborn child file a petition for his or her parents to immigrate."[113] By denying agency in immigration law to children, it is thought, "a woman who is otherwise a deportable alien does not have any incentive to bear a child (who automatically becomes a citizen) whose rights to stay are separate from the mother's obligation to depart."[114] Yet the devaluation of children's interests found in immigration law and the automatic ability of parents to qualify for immigration status are hardly the only conceivable responses to the reality of *jus soli* citizenship.

There is little reason, moreover, to believe that stripping children of agency in the immigration law actually is an effective deterrent on the birthrates in immigrant families. Parents choose to have children for numerous reasons other than gaining favor in the immigration system. Despite the challenges facing mixed status families, they continue to grow in number. Certainly, the effectiveness of creating barriers to families regularizing their immigration status is not evident in a reduction in the size of the undocumented population. Rather, what is evident are the effects of devaluing children and creating barriers to families regularizing their immigration status, as demonstrated in the challenging conditions and insecurities under which mixed status families live. The brunt of these effects is felt by children.

Aside from considerations of fairness in a system where children pay the cost of their parents' actions, the willingness to trade the present and future of citizen children for an alleged deterrent on unauthorized immigration is shortsighted at best. In particular, if children are to have a productive future in the United States, they should not be handicapped from the start. But the nation's current formal and informal barriers to the social benefits of citizenship for children in mixed status families create conditions in which such children, citizen and noncitizen alike, routinely are assimilated to the status of undocumented immigrants. If we wish children to succeed as adults, it makes little sense to force them to start life at a disadvantage by imposing barriers to full social citizenship. It makes even less sense to see citizen children leave with deported parents only to return as adults who are unaccustomed and unacculturated to life in this country.

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[113] Motomura, *supra* note 106, at 516.

[114] Oforji, 354 F.3d at 618. *See also* Faustino v. INS, 302 F.Supp. 212, 215-16 (S.D.N.Y. 1969), *aff'd* 432 F.2d 439 (2d Cir. 1970), *cert. denied* 402 U.S. 921 (1970) (providing an appendix of Senate hearings transcripts that discuss desire to draft immigration provisions to avoid extending immediate admission to parents on the basis of the birth of child in the United States).

The irony of current immigration law is that citizen children, when they cease to be children, are permitted to sponsor their parents for immigration status. In other words, immigration law fully contemplates the parents of citizen children as legal residents, but only after a 21 year moratorium encompassing the most developmentally critical periods of the children's lives. Assuming a need to penalize parents for arriving in the United States without proper authorization, there must be an appropriate penalty that does not simultaneously punish a citizen child for 21 years. More pointedly, any immigration reform debate that discusses only the desire not to reward particular behaviors of parents without consideration of the resulting punishment of children is incomplete.

Of course, parents of citizen children need not be granted automatic and immediate immigration status. But as the nation seriously considers extending legal status to undocumented workers based, in part, on the equity that they have established through years of contributions in the country's workplaces, it is not be unthinkable that family ties in the United States similarly give rise to equitable considerations. Such considerations would serve to make to make immigration reform more forward looking rather than backward looking. Recognition of parents' role in nurturing and supporting their children in this country can serve as a principled reason not to enhance but rather to reduce immigration barriers for family members who are likely to ultimately be admitted to legal status anyway. In other words, rather than saving some of its toughest sanctions for families already living here with close and lasting ties to this country, immigration law must find ways to value those ties within the framework of immigration laws by empowering children and acknowledging their importance in families.

Despite immigration law, children are a central organizing force for many families. Any "assumption that children's immigration status must derive from that of their parents rather than vice versa recalls an earlier set of gendered assumptions – that women traveled with or followed their husbands, but not vice versa."[115] For example, it was only with the 1922 Cable Act that "marriage to an alien no longer stripped a woman of her citizenship automatically."[116] Just as it once was deemed

[115] Jacqueline Bhabha, *The "Mere Fortuity" of Birth? Are Children Citizens?*, 15(2) Differences 91, 96 (2004).
[116] Miller v. Albright, 523 U.S. 420, 464 (1988). A woman "still lost her United States citizenship if she married an alien ineligible for citizenship; she could not

natural that a woman's immigration and citizenship status followed that of their husband,[117] the "one-way descending flow of familial transmission of citizenship, from parent to child rather than from child to parent, is accepted as a natural rather than a constructed asymmetry."[118] The restriction on children serving as the source of immigration status is no more natural than the restriction on women so serving was. Immigration and citizenship law have evolved past the narrow and constructed view of women as objects, and it is time that the same is accomplished for children.

Outside the realm of immigration law, the primacy of children's interests in family decisions is now deeply entrenched. At times, this is the result of children actively participating in and influencing family decisions. Yet even if we characterize parents as making important family decisions, this merely obscures the fact that when parents make such decisions they frequently are giving effect to children's rights and interests. When family courts are involved in decisions about children, the interests of children are certain to be the central factor.[119] Similar recognition of the interests and rights of children in immigration law is long overdue. Through such recognition, immigrant families may find a path from here to here.

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become a citizen by naturalization if her husband did not qualify for citizenship; she was presumed to have renounced her citizenship if she lived abroad in her husband's country for for two years, or if she lived abroad elsewhere for five years. *Id.* Moreover, a "woman who became a naturalized citizen was unable to transmit her citizenship to her children if her noncitizen husband remained alive and they were not separated." *Id.* This rule remained in effect until 1934. *Id.*

[117] Indeed, not all that long ago, the notion of women with agency seemed a radical idea. *See* Lucy S. McGough, *Families in the 21st Century: Changing Dynamics, Institutions, and Policies, Introduction: The Past as Prologue*, 54 Emory L.J. 1219, 1220 (2005) (noting that a century ago the Yale Law Journal included an article entitled "Are Women People").

[118] *Id.* at 99.

[119] "The custody law in every state in the United States . . . embraces the 'best interest' standard." D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes – A Comparative Exploration*, 39 Fam. L.Q. 2, 247 (Summer 2005).